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No. 98-208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CAROLE KOLSTAD,

Petitioner,

vs.

AMERICAN DENTAL ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICI CURIAE* OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL WOMEN'S LAW CENTER, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, and PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER

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CONSENT OF PARTIES

Petitioner and Respondent have consented to the filing of this brief, *amici curiae*.[1]

INTERESTS OF THE AMICI CURIAE

Mexican American Legal Defense and Educational Fund ("MALDEF") is a national not-for-profit organization that protects and promotes the civil rights of more than 29 million Latinos living in the United States. MALDEF is particularly dedicated to securing such rights in the areas of employment, education, immigration, political access and public resource equity. The question presented by this case is of great interest to MALDEF because it implicates the scope of the remedies available to victims of discrimination, as well as how courts should view the act of intentional discrimination itself.

The National Women's Law Center ("NWLC") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended. NWLC has a deep and abiding interest in assuring the eradication of discrimination against women in the workplace.

The Puerto Rican Legal Defense and Education Fund ("PRLDEF") is a national civil rights organization that exists to

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[1] Their consents have been filed with the clerk of this Court. No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

ensure that every Puerto Rican as well as other Latinos are guaranteed equal opportunities to succeed. Through litigation, advocacy and education, PRLDEF has initiated hundreds of cases to combat discrimination in significant areas such as education, housing, employment, voting and language rights. PRLDEF supports Petitioner Kolstad's position in this matter since the circuit court's decision, if allowed to stand, threatens to limit an important and necessary remedy available to the Latino community.

The National Partnership for Women & Families, a nonprofit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance women's opportunities in employment.[2]

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[2] *Amici*'s interest in this issue is far from academic. In 1997, Hispanics filed approximately 9000 charges with the United States Equal Employment Opportunity Commission ("EEOC") and Fair Employment Practice Agencies seeking relief for discrimination on the basis of race and/or national origin. This constituted approximately eleven percent of all charges filed alleging race discrimination and more than fifty percent of all charges alleging discrimination due to national origin. More than 24,000 charges were filed in 1997 with the EEOC alleging discrimination on the basis of gender. *See* United States Equal Employment Opportunity Commission, Office of Communications and Legislative Affairs, *EEOC and FEPA Receipts, Charges Filed By Hispanics Received in Fiscal Year 1997, Statute/Basis Summary of Issues;* EEOC National Database: 1997 *Charges Filed Alleging Sex Discrimination.*

SUMMARY OF ARGUMENT

Each year, tens of thousands of men and women commence civil actions in federal court to vindicate their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended ("Title VII"). Undeniably, the vast majority of these individuals allege that their employers have intentionally discriminated against them because of their race, gender, religion, ethnicity, or national origin. The Civil Rights Act of 1991 (the "1991 Act") allows for punitive damages in such cases upon a showing that the defendant acted with malice or reckless disregard of the plaintiff's rights. By conditioning the availability of punitive damages upon a showing of "egregiousness," the Court of Appeals for the District of Columbia creates a hurdle for employees not found in or supported by the plain language of the statute, usurps their right to a jury, and undermines important aspects of this nation's civil rights policy. This Court's review is needed both to address this important issue and to resolve the division which has developed among the circuits regarding the appropriate standard for punitive damages under the 1991 Act.

REASONS FOR GRANTING THE PETITION

I. THE OUTCOME OF THIS CASE WILL DEFINE THE REMEDIES AVAILABLE TO THOUSANDS OF VICTIMS OF DISCRIMINATION

Approximately 40,000 civil rights cases were commenced in federal court during the twelve month period ending June 30, 1998.[3] Of these, more than 400 were filed in the District Court for

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[3] Administrative Office of the United States Courts, *Table C-3: Federal Judicial Caseload Statistics, June 30, 1998.*

the District of Columbia, representing more than twenty five percent of all civil cases commenced in the district that year.[4] Nationwide, the majority of civil rights cases involve allegations of employment discrimination.[5]

A significant percentage of employment discrimination actions reach trial. For example, in 1997 alone, federal trials were held in more than 1,100 employment discrimination suits, constituting more than twenty five percent of all federal question civil trials.[6] In nearly eighty percent of those cases, the plaintiff elected to have his or her case heard by a jury.[7] As these statistics suggest, the outcome of this case will define and limit the damages available to the plurality of litigants seeking to vindicate their federal rights in federal court.[8]

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[4] *Id.*

[5] Administrative Office of the United States Courts, *Table C-2A: U.S. District Courts Civil Cases Commenced, By Nature of Suit During 12 Month Periods Ended June 30, 1994 through 1998*, Employment Civil Rights Cases for 12 Months Ended June 30, 1998: 23,804.

[6] Administrative Office of the United States Courts, *Table C-4: U.S. District Courts Civil Cases Terminated, By Nature of Suit And Action Taken, During The 12 Month Period Ended June 30, 1997.*

[7] *Id.*

[8] In the year ending March 31, 1997, more civil rights actions were commenced in federal court than any other category of civil case as defined by the Statistics Division of the Administrative Office of the United States Courts. Administrative Office of the United States Courts, *Table C-3: Federal Judicial Caseload Statistics, March 31, 1997.*

The right of a Title VII plaintiff to submit his or her punitive damages claim to a jury now largely depends on the circuit court in which the claim was filed. *Amici* agree with Petitioner that a significant split among circuit panels has developed with respect to the standard for punitive damages under 42 U.S.C. § 1981a(b)(1) (Pet. at pp. 9-19), that this circuit conflict affects thousands of litigants each year, and that it justifies the exercise of this Court's certiorari jurisdiction.

II. THE MAJORITY EN BANC DECISION BELOW IS IN CONFLICT WITH THE PLAIN LANGUAGE OF THE 1991 ACT AND PRIOR DECISIONS OF THIS COURT

The 1991 Act provides that a plaintiff may recover punitive damages upon showing that the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to [his or her] federally protected rights . . . ." 42 U.S.C. § 1981a(b)(1). Section 1981a(b)(1) is modeled on the standard for punitive damages explicated by this Court in *Smith v. Wade*, 461 U.S. 30, 52 (1983). *See* H.R. Rep. No. 40, 102d Cong., 1st Sess. 74 (1991), *reprinted in* 1991 U.S.C.C.A.N 549, 612.

In *Smith v. Wade*, this Court established a functional framework for determining the availability of punitive damages in a suit brought under 42 U.S.C. § 1983. Noting that "society has an interest in deterring and punishing *all* intentional and reckless invasions of the rights of others, even though it sometimes chooses not to impose liability for lesser degrees of fault," this Court held that the question of whether a defendant's conduct "met the recklessness threshold" was a question of ultimate fact for the jury. *Smith v. Wade*, 461 U.S. at 52-54 (emphasis in original).

The majority *en banc* decision departs from this Court's decision in *Smith v. Wade*, in holding that an award of punitive damages is not within the province of the jury in cases of "garden-variety" intentional discrimination, but only when the defendant's conduct is "egregious." 139 F.3d at 968. This interpretation cannot be squared with the plain language of the statute. The term "egregious" does not appear in Section 1981a(b)(1), and the 1991 Act is bereft of any other language justifying a heightened standard for punitive damages. Quite simply, the statute does not support the reading which the court below attributes to it.

Additionally, the stated rationale for the majority *en banc* decision--that the "remedial structure" of the statute requires a different standard for liability and damages--was expressly rejected by this Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993). *Hazen* held that proof of intentional discrimination on the basis of age is sufficient to establish that the employer acted with "reckless disregard" of an employee's rights under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq.. No heightened showing was necessary in order to obtain liquidated damages; indeed, this Court found that a requirement of "egregiousness" imposed by several circuits at the time was just plain wrong. *Id.* Now, five years on, the District of Columbia and Sixth Circuit, unmindful of this Court's admonishment, have again imposed a heightened punitive damages requirement. *Amici* support Petitioner's request for review so that this important question can be definitively resolved.

III. THE COURT BELOW IMPROPERLY USURPED THE JURY'S ROLE IN ASSESSING PUNITIVE DAMAGES

The creation by the court below of an "egregiousness" standard substantially undermines the jury's role in assessing punitive damages. It has long been understood that determining the

gravity of a defendant's misconduct is a function particularly suited to members of a jury, who are more likely to be attuned and sensitive to prevailing societal norms and thus better able than the court to decide when the violation of those norms has been "reckless." *See Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763) (award of punitive damages within the jury's discretion "as proof of the detestation of the jury to the action itself"). The Second Circuit Court of Appeals recently explained the continuing importance of this role in the context of a sex harassment claim:

> A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations. Such an effort, even were it successful, would produce questionable legal definitions for the workplace where recognition of employees' dignity might require standards higher than those of the street . . . [t]oday, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment and retaliation. . . . [w]hatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications.

Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998), citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955) ("[j]uries fairly chosen from different walks of life bring into the

jury box a variety of different experiences, feelings, intuitions, and habits").

These concerns also apply to a claim of discrimination based on race, ethnicity, or national origin, where issues of culture, language and identity are often implicated. In such cases, whether or not one believes that an employer discriminated with "malice" may turn upon one's perception and understanding of the subtle stereotypes that sometimes infiltrate working relationships and poison working conditions. A jury selected from a cross-section of the community is particularly well-suited to make that determination.[9]

The issue is not simply one of the decision-maker's race, gender or ethnicity. Federal judges, as a group, are less likely to have the broad life experiences possessed by members of a jury drawn from a cross-section of the community. For example, in this case, the court below concluded that there was nothing "egregious" about denying Kolstad the promotion she sought because of her gender. However, a jury of her peers might have included men and women who had experienced job discrimination in their own lives, or who had witnessed the insidious machinations of pre-selection at companies where they had worked. What

[9] In 1998, Latinos comprise approximately eleven percent of the U.S. population. However, only 4.2 percent of the judges actively serving on the federal bench are Latino. Women are also substantially underrepresented on the bench: while women comprise more than fifty percent of the U.S. population, only eighteen percent of sitting federal judges are female. United States Department of Commerce, Bureau of the Census, Population Division, *Population Paper Listing-91, Appendix A;* Alliance for Justice, *Demographic Portrait of the Federal Judiciary as of August 3, 1998.*

is certain is that the Kolstad jury saw the evidence presented, heard the testimony of witnesses, and was well-positioned to determine whether Respondent acted with malice or reckless disregard of Kolstad's rights when it discriminated against her on the basis of her gender. By denying the jury the opportunity to speak on this issue, the court below has frustrated the effectiveness of the 1991 Act in two material ways: first, by diminishing the scope of the remedy afforded to victims of discrimination; second, by taking away the right to a jury trial.[10]

In usurping the jury's traditional role in assessing a defendant's conduct for purposes of punitive damages, the court below endorses a "raised eyebrow" test of its own, unguided by the quantum of outrage the jury might have felt toward Respondent's actions. Such distrust of the jury's common sense and sensibilities is inappropriate. *Cf. BMW of North America, Inc. v. Gore*, 517 U.S. 559, 613 (1996) (Ginsburg, J. dissenting) (noting this Court's "longstanding reluctance" to review the size of jury verdicts in federal court proceedings); *see also Gore*, 517 U.S. at 600 (Scalia, J. dissenting) ("[t]oday's decision . . . is really no more than a

[10] The court below's conclusion is also at odds with guidelines issued by the EEOC indicating that the jury rather than the judge should determine the applicability of punitive damages under the 1991 Act. See *EEOC Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act*, Section II.B.1., issued July 7, 1992 ("conscious, purposeful discrimination may be sufficient to warrant punitive damages"). The court below erred by failing to accord deference to the EEOC's interpretation. *See EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988).

disagreement with the community's sense of indignation or outrage expressed in the punitive award of the Alabama jury. . . .")[11]

Even if the court below is correct that some heightened showing above and beyond the standard for liability is required before punitive damages may be awarded, its choice of "egregiousness" is untenable because it lacks three basic qualities of a legal rule or standard: uniformity; predictability; and reviewability. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 Harv. L. Rev., Nov. 1992, at 65 (citing uniformity, predictability, and "separating matters of law from matters of fact" as characteristics of a rule-based jurisprudential approach). A judge's decision must be guided either by a defined rule or a textured standard that takes factual variants into consideration. For example, the EEOC suggests a number of factors that a jury might consider in deciding whether to assess punitive damages, including: proof of threats or deliberate retaliatory action; the employer's early efforts at remediation; the existence of similar past discriminatory conduct; the duration of the discriminatory conduct; the nature, extent and severity of the harm suffered by the employee; and the degree of egregiousness and nature of the

[11] In *Gore*, this Court held that a punitive damages award of $2 million in a case involving fraud in the sale of a repainted automobile was so grossly excessive as to violate the due process clause of the Fourteenth Amendment. 517 U.S. at 574-75. The due process concerns underlying this Court's decision in *Gore* are not present here, of course, where the appellate court's decision precludes the issue from even reaching the jury. Indeed, these concerns could not be present, because the 1991 Act imposes strict limitations on the size of punitive and compensatory damage awards. The largest possible award under the 1991 Act is $300,000 inclusive of punitive *and* compensatory damages. *See* 42 U.S.C. § 1981a(b)(3).

employer's conduct. *EEOC Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act*, issued July 7, 1992. At the very least, the existence of factual questions related to any of the above factors should be sufficient to send the issue of punitive damages to the jury.

Here, the court below simply offers up the value judgments of the particular judge presiding over the trial, in the same manner in which it imposed its own value judgments by minimizing the misconduct proven against Respondent.[12] The certainty exhibited by the court below in the correctness of that moral judgment, unguided by any objective criteria and disconnected from the sensibilities of the jury, is unwarranted. This case offers this Court the opportunity to delineate the proper roles of judge and jury in assessing punitive damages and to decide what rule or standard should govern such awards under the 1991 Act.

[12] The court below itself highlights the flawed nature of the "egregiousness" standard in comparing the present case with *Smith v. Wade*. In order to justify its strained interpretation of *Smith v. Wade*, the court below characterizes as "egregious" the prison guard's behavior in that case, but concludes that intentionally locking Kolstad out of the promotional process because of her gender is not. 139 F.3d at 964, 969. However, reasonable people could reach an entirely different conclusion: that Respondent's conduct here was "egregious" because it was committed with the intent to deny Petitioner advancement in her profession because of her gender, while Smith's conduct was not "egregious" because he never intended to cause any injury to the inmate under his care. 461 U.S. at 32-33.

IV. THE MAJORITY EN BANC DECISION UNDERMINES NATIONAL CIVIL RIGHTS POLICY AGAINST DISCRIMINATION IN EMPLOYMENT

Title VII and the 1991 Act embody our national policy against discrimination in the workplace, reflecting "a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995) (noting that the ADEA and Title VII are part of a "wider statutory scheme to protect employees in the workplace nationwide"). Through this legislation, Congress has expressed its view that discrimination against an employee because of his or her gender, race, religion, ethnicity, or national origin is an evil worthy of sanction. Indeed, "disparate treatment was the most obvious *evil* Congress had in mind when it enacted Title VII." *Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977) (emphasis added); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (O'Connor, J. concurring) ("[t]here is no doubt that Congress considered reliance on gender or race in making employment decisions as evil in itself").

The majority *en banc* decision undermines this nation's civil rights policy in at least two respects. First, by limiting punitive damages to "egregious" cases of intentional discrimination, the court below eviscerates the deterrent value of Section 1981a(b)(1) with respect to an entire class of cases. A primary purpose of federal civil rights legislation has always been the deterrence of future unlawful conduct. *McKennon*, 513 U.S. at 358; *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975). However, Congress found that the equitable remedies initially available under Title VII proved ineffective at deterring discrimination in the workplace. For example, a victim of unlawful discrimination who quickly mitigated her back pay damages

by locating replacement employment could obtain no monetary relief from the court. The absence of any financial penalty for discrimination meant that companies lacked an economic incentive to stop discriminating. *See, e.g., Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (noting in the context of a suit under 42 U.S.C. § 1983 that "the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future"). The 1991 Act was designed to close this loophole by imposing an economic cost for intentional discrimination where one might not have otherwise existed, thereby fundamentally changing the way corporate America looks at the issue of bias in the workplace. *See* H.R. Rep. No. 40, 102d Cong., 1st Sess. at 69-70, *reprinted in* 1991 U.S.C.C.A.N. at 607-608. By denying punitive damages to an entire class of discrimination victims, the court below releases employers who unlawfully discriminate from the obligation of paying for their bad acts.

Second, the artificial categorization of intentional discrimination by the court below into "garden-variety" cases and "egregious" cases, 139 F.3d at 968, evinces an insensitivity to the problem of workplace bias that is without textual or historical foundation. *See Teamsters*, 431 U.S. at 335. It implies that discrimination is reprehensible only when an employer uses racially inflammatory language or leaves some other "smoking gun" evidence of his malicious intent. But intentional discrimination is no less insidious because it is done secretly, without the use of racial epithets or sexually demeaning language. Indeed, the most despicable discriminator may be the one who does his dirty work with a smile on his face. As we near the end of the twentieth century and the thirty-fifth anniversary of the Civil Rights Act of 1964, sophisticated employers who create a glass ceiling for women and minorities in the workplace may have learned to be circumspect about the language they use while engaging in discrimination.

However, it is their actions, not simply their words, that Congress sought to remedy, deter, and punish.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the petition for a writ of certiorari to determine the appropriate standard for assessing punitive damages under Section 1981a(b)(1) of the 1991 Act.

Respectfully submitted,

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